IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 08-0439

JULIE CHRISKE,
Appellant,

v.

STATE OF MONTANA ex rel Department of Corrections and Institutions,
Appellee.

* * * * * *

APPELLANT'S INITIAL BRIEF

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On appeal from the Fifth Judicial District Court
Jefferson County

* * * * * *

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Appellant has been in a personal bankruptcy proceeding but the Bankruptcy Court has given authorization to the undersigned, through the Bankruptcy Trustee, to file this her initial brief. The undersigned must report the results of this case though to the Bankruptcy Court and will do so.

ISSUES ON APPEAL

The issues on appeal are as follows:

1) The district court erroneously interpreted and misapplied this Court's pronouncements in *Kaeding v. W.R. Grace and Co.*, 1998 MT 160, 961 P2d 1256.

2) The district court erred in concluding that summary judgment was appropriate because Appellant filed her complaint more

than three years after she acknowledges being made aware that she had been diagnosed with COPD.

STATEMENT OF CASE

Appellant, Julie Chriske, brought this action in district court for personal injury damages suffered as a result of the acts and omissions of the Appellee. Appellee filed for and received summary judgment in its favor. Appellant has appealed the district court's ruling on the grounds above.

STATEMENT OF FACTS

Appellant was incarcerated at the Mountain View School in Helena, Montana, in approximately 1971 at the ripe age of 14. (Appellant Depo. pp. 28, 30.) At that time, State of Montana would reward good behavior by providing cigarettes to minors at that Mountain View School, a practice which lasted for many years. (Appellant Depo. pp. 90-91.) During the two year period of aftercare from July 1, 1973 to July 9, 1975, Appellant received visits from state workers as referenced in the lower court's order on summary judgment. It is unrefuted that the state aftercare workers both allowed Appellant to purchase cigarettes and occasionally would supply her with cigarettes to the point that she became addicted while a minor.

Appellant made many efforts to stop smoking over the years. (Appellant Depo. pp. 36-38.) Over the years she had chronic coughing and wheezing. (Appellant Depo. p. 62.) At times she had some asthma. On August 2, 2001, she saw her internist, Dr. Jeannie Brandt, M.D., who advised her that she suspected Appellant was suffering from a condition called COPD, Chronic Obstructive Pulmonary Disease of "probable recent onset". (Appellant Depo. p. 64.) Three years subsequent to that Appellant filed suit against the State for causing her to be addicted to cigarette smoking and in turn being damaged from that cigarette addiction.

STATEMENT OF STANDARD OF REVIEW

This case was adjudicated by the lower court on Appellee's motion for summary judgment. Accordingly, this Court's review is de novo. *Anderson v. Schenk*, 2009 MT 399 ¶ 2. Summary judgment represents an extreme remedy and should be granted only when there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. See, *Richards v. County of Missoula*, 2009 MT 453 ¶ 16.

SUMMARY OF ARGUMENTS

1. The lower court clearly misapplied what this Court pronounced in *Kaeding v. W.R. Grace and Co.*, 1998 MT 160, 961 P2d 1256. Though Appellant had a number of different ailments over the course of time, she had no idea and had never been advised by a doctor that she was suffering from something which was irreversible and caused by smoking. The lower court, in essence, concluded that as long as Appellant knew of her symptoms and provided the symptoms were part and parcel of or led to COPD, then she was "on notice" well before she was first ever advised by a physician that she had COPD.

2. The district court concluded that summary judgment was appropriate because even if Appellant knew for the first time of her COPD on August 2, 2001, she was still late and after 3 years in filing her complaint, which was filed on August 2, 2004. However, August 1, 2004 was a Sunday.

ARGUMENT NO. 1

The district court at page 5 of its Order stated that, "It is undisputed that the facts constituting tobacco-related diseases are by their nature concealed or self-concealing." The court then

acknowledged that Appellant did not learn that she had Chronic Obstructive Pulmonary Disease until her doctor examination of August 2, 2001. The district court though held that COPD is nothing more than a progression of small airway obstruction. However, something can progress from something else just as small airway obstruction can progress from a chronic cough yet no one would say that the statute of limitations began at the point in time that Appellant began suffering from a chronic cough. That is, however, what the lower court did in this case. As the district court stated at page 5, "Thus, the determinative factor is whether Chriske discovered or, in the exercise of due diligence, should have discovered that she suffered from small airway obstruction before August 2, 2001." That flies in the face of the Doctor's report itself which states that the COPD was of "probable recent onset". (This record is referred to at Appellant Depo. p. 62, was provided in Response to Production Requests and is attached as Exhibit 2.)

The Montana Supreme Court in *Nelson v. Nelson*, 2002 MT 151, 50 P3d 139, at p. 9, held as follows:

> We review appeals from summary judgment rulings de novo. *Sleath v. Westmont Home Health Services*, 2000 MT 391, p. 19, 304 Mont. 1, p. 19, 16 P3d 1042 p. 19 (citation omitted). When we review a district

> court's grant of summary judgment we apply the same evaluation that the district court uses, based on Rule 56, M.R.Civ.P. *Sleath*, 19 (citation omitted). We set forth our inquiry as follows:
>
> The movant must demonstrate that no genuine issue of material fact exists. Once this has been accomplished, the burden then shifts to the non-moving party to prove, by more than mere denial and speculation, that a genuine issue does exist. Having determined that genuine issues of fact do not exist, the court must then determine whether the moving party is entitled to judgment as a matter of law. We review the legal determinations made by a district court as to whether the district court erred.
>
> *Sleath*, 19 (citing Oliver v. Stimson Lumber Co., 1999 MT 328, p. 21, 297 Mont. 336, p. 21, 993 P2d 11, p. 21). We review a district court's interpretation of law to determine if it is correct. *Steinback v. Bankers Life and Cas. Co.*, 2000 MT 316, p. 11, 201 Mont. 483, p. 11, 15 P3d 872, p. 11 (citation omitted).

It is very important to determine whether the facts constituting the cause of action for personal injury are by their nature concealed or self-concealing and in this case the district court agreed that they were concealed or self-concealing and thus the period of limitations does not begin to run until the injured party has discovered the fact constituting the claim or with due diligence should have discovered those facts. See, *Gomez v. State*, 1999 MT 67, p. 10, 293 Mont. 531, 975 P2d 1258.

Two important and similar cases are those of *Nelson, supra*, at p. 18 and *Hando v. PPG Industries Inc.* (1989), 236 Mont. 493, 771 P2d 956. In those cases, the Court noted that the Plaintiff needed to have knowledge concerning the ultimate causal link between the ailment suffered by them in the exposures the plaintiffs experienced. In each case the Court noted that the plaintiffs suspected the cause of their injuries and diligently sought medical treatment and diagnoses but were not certain of the causal relationships until later confirmed by their physicians. The court noted also that the plaintiffs in each of those cases suffered immediate affects from exposure to chemicals and a vaccine as evidenced by loss of consciousness but both plaintiffs also suffered other continuing affects that neither could have predicted at the time of the exposure. Both plaintiffs had asserted beliefs or suspicions that their medical problems stemmed from exposure to chemicals and the vaccine. The Court in *Nelson* held that if the state of the plaintiff's knowledge or her diligence in discovering the causal link between the event and the medical condition was disputed the issue could not be resolved on summary judgment but instead because there was conflicting evidence as to when a cause of

action accrued, the question of whether the action is barred by the statute of limitations is specifically one for the jury to decide.

That is precisely what we have here. There is dispute as to whether the statute of limitations bars the action, because there is a question when did Appellant learn of her cause of action, including the causal link between smoking and the serious condition she was suffering (COPD). That issue needs to be resolved by a jury and the Supreme Court has previously held precisely thus. See also, *Hill v. Squibb and Sons, ER*, 1979, 181 Mont. 199, 212, 592 P2d 138, 1390-91. And see, *McCormick v. Brevig*, 1999 MT 86, pp. 102-103, 294 Mont. 144, 980 P2d 603.

In *Kaeding, supra,* it was noted that the plaintiff had been diagnosed with a number of different ailments over the course of time, including the fact that he was told before 1962 that W.R. Grace was aware that vermiculite dust contained asbestos and that asbestos was a serious health hazard. Thirty years before he filed an action he suffered lung and heart related ailments. A radiologist in 1967 had noted he had old fibrosis in his lungs which suggested the possibility of asbestosis with fibrosis and scarring. In 1969, Kaeding was diagnosed with thyroid toxicosis and with tuberculosis in 1971. From

1973 to 1995 he had several x-rays which revealed scarring from TB and in 1983 he had been told he had chronic lung disease secondary to pneumonia and smoking, as well as working at W.R. Grace. The reason why the Supreme Court held against Kaeding and upheld a statute of limitations argument against him was because there was a September 1, 1992 letter from a physician to his attorney which advised that he was suffering from a condition referred to as advanced asbestosis. He did not file his lawsuit until June 12, 1996 which is clearly past the 3-year statute of limitations. Factually, though, the only difference between the *Kaeding* case and this case is that Appellant in this case filed her complaint within the 3-year statute of limitations and not thereafter.

Interestingly at page 2 of its Memorandum in Support of its motion for summary judgment, Appellee admits that Appellant's smoking related condition progressed to "Chronic Obstructive Pulmonary Disease" which was first diagnosed in August of 2001. That is when Appellant realized she had a life threatening disease caused by smoking.

The Montana Supreme Court discussed a similar situation in *Gomez v. State*, 1999 MT 67, p. 11, wherein the Court stated that

oftentimes when a person is exposed to chemicals or other substances which result in a latent disease or injury, the situation can involve facts which by their nature are self-concealing. Of course, the district court admitted this in this case. As a consequence of that the Montana Supreme Court held that in latent disease or injury cases the point at which the statute of limitations begins to run is ascertained by applying the discovery rule to determine when the injured person knew or in the exercise of due diligence should have known the facts constituting the cause of action. Here, Appellant would not sue if all she had was a cough. COPD is an entirely different matter.

The Montana Court held in *Kaeding* that the statute of limitations began to run from at least the time of the conclusions by the physicians in 1992. The Montana Court did not find that his statute of limitations began any earlier, such as in 1967 when he was advised that there was a possibility he was suffering from asbestosis with fibrosis and scarring. The Court did not hold that his time ran beginning 1983 when he was diagnosed by yet another physician and was told he had chronic lung disease secondary to pneumonia and smoking. Nor did the Court state that his time for filing suit ran in 1985 when the same doctor diagnosed him with emphysema from his

history of smoking and working at W.R. Grace. The Court likewise did not say that Mr. Kaeding's time for filing his lawsuit began to run from January 1985 when radiological tests were conducted and reported that he had plural placquing which was most compatible with asbestosis. The Court also did not say that Mr. Kaeding's time for filing his lawsuit began on October 22, 1991 when the nurse associated with the Veterans Administration Hospital indicated in a progress note that he appeared to have an advance case of asbestosis.

The same is true in this case. While Appellant may have had a cough, occasional chest colds or pneumonia, she did not learn until August, 2001 that whatever she previously had to that was not Chronic Obstructive Pulmonary Disease. This Court can take judicial notice of the fact that some people can have asthma and never be a smoker. Some people can have bronchitis or small airway obstructions and never have been a smoker. Further, people can have a cough or asthma or bronchitis or small airway obstructions which simply go away or heal and it is not a permanent condition or one which can be easily treated with medication. That is all very different from COPD.

In this case, Appellant testified that she didn't recall any coughing fits or anything such as chronic bronchitis until the 2001 timeframe. Appellant Dep. p. 65, lines 11-15. She was specifically asked whether she was diagnosed with COPD at any time prior to August 2001 and she stated: "No. I remember distinctly the day." Appellant Dep. p. 64. She testified:

> Q. You said you remember the date?
>
> A. I remember being very upset.
>
> Q. Were you surprised?
>
> A. Yes.
>
> Q. You must have had lung symptoms before the diagnosis.
>
> A. But everybody I knew that smoked did, everybody I knew.
>
> Q. What sort of symptoms did you have before the diagnosis?
>
> A. People who smoke cough, people who smoke sometimes have more colds or get winded more easily. Yah, I was surprised. It's different when they put a name on it and you didn't know what it meant at first.

Appellant Dep. pp. 64-65.

The plain fact of the matter is Appellant did not have any appreciation that she was one of those people who did have life

threatening tobacco related disease until she was tested and told by her physician on August 1, 2001 that she had COPD.

ARGUMENT NO. 2

August 2, 2001 was on a Wednesday. August 1, 2004, which would be the last day of the 3-year statute of limitations fell on a Sunday and thus filing the Complaint on Monday, August 2, 2004, was proper and within the statute of limitations. The lower court ruled that August 2, 2004 was past the 3 year statute of limitations, but that is incorrect.

CONCLUSION

WHEREFORE, Appellant urges that the lower court's summary judgment ruling be reversed and that the case be remanded for trial on the issues of when Appellant learned of the seriousness of her condition (COPD), the liability of the State for causing her nicotine addiction, and the damages suffered by Appellant.

DATED this 29th day of March, 2010.

DOUBEK & PYFER, LLP

By _____
John C. Doubek

Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of March, 2010, I served a true and correct copy of the foregoing upon by inserting a copy of the same in a stamped envelope and depositing it in the United States Post Office at Helena, Montana, upon:

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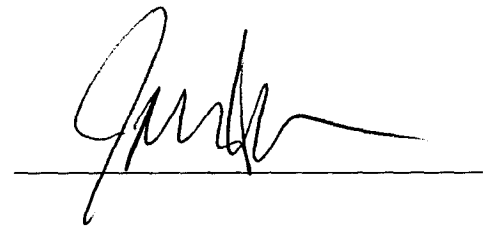

CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant's Initial Brief complies with MONT. R. APP. P. 27 in that it is double spaced with side margins of 1.5 inches and top and bottom margins of 1 inch; that the document is proportionately spaced, of Times New Romans typeface 14, and contains 2,745 words, exclusive of tables and appendix.

DATED this 29th day of March, 2010.